

LON PHILPOTT

IBLA 73-200

Decided November 12, 1973

Appeal from decision of Anchorage Alaska State Office rejecting final proof for homestead entry A-067526 and canceling claim.

Set aside and remanded.

Alaska: Homesteads! ! Homesteads (Ordinary):  
Cultivation! ! Homesteads (Ordinary): Final Proof

Where a homestead claimant submits a final proof which shows on its face that he has not cultivated the full area required and has not qualified for military credit or reduction in the cultivation requirements, action rejecting final proof and canceling the claim may be suspended to permit the entryman to apply to purchase not more than five acres under the Homestead Act of May 26, 1934, failing which the proof will be finally rejected and the claim cancelled.

APPEARANCES: Lon Philpott, pro se.

OPINION BY MR. STUEBING

Lon Philpott appeals from a decision dated October 26, 1972, of the Alaska State Office, Bureau of Land Management, rejecting his final proof for a homestead settlement claim, filed pursuant to the Homestead Law, 43 U.S.C. §§ 270, 161 et seq. (1970), and canceling his claim. The Bureau so acted because appellant's final proof failed to show that he had completed the necessary cultivation required by law.

On March 31, 1966, Philpott filed his notice of location for 160 acres of unsurveyed land located in protracted sections 15 and 16, T. 30 S., R. 58 E., Copper River Meridian. 1/ The statutory

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1/ This is the correct land description. Originally, appellant had mistakenly applied for section 27.

life of the claim expired on March 30, 1971, and on April 1, 1971, appellant filed his final proof. The final proof showed that appellant cultivated one acre of land during the first entry year and two acres during each subsequent year. The State Office decision of May 4, 1971, stated that the final proof was defective because appellant had failed to meet the cultivation requirements prescribed by 43 CFR 2567.5(b) which reads, in part, as follows:

Cultivation. There must be shown also cultivation of one! sixteenth of the area of the claim during the second year of the entry and of one! eighth during the third year and until the submission of proof, unless the requirements in this respect be reduced upon application duly filed.

Since the area claimed by appellant was 160 acres it would have been necessary for him to cultivate ten acres during the second entry year and twenty acres each subsequent year until submission of final proof.

Appellant relied on 43 CFR 2096.1-2(a)(1) which allows a qualifying under the regulations to substitute his military service to satisfy the cultivation requirements for two of the four entry years. Therefore, the decision stated that appellant must show cultivation for the other two entry years. The decision noted, however, that appellant had failed to submit proof of military service as required by the regulation.

The decision also explained that the Department has held that a homestead entryman who cultivates a portion of the required area of his entry in compliance with the cultivation requirements may receive a patent to a proportionate part of the land in his entry upon relinquishment of the balance of the land embraced in the entry, if he has otherwise complied with the homestead law. See Thomas G. Simmons, Jr., A-30076 (November 19, 1964); see also George Mor, A-30914 (May 27, 1968). The State Office concluded on the basis of this authority that appellant may be able to qualify for 16 acres.

Final proof was also found deficient in that no final proof of witnesses having personal knowledge of the facts was submitted as required by law. The State Office allowed appellant 60 days from receipt of the decision to:

(1) [S]ubmit final proof testimonies of two witnesses who have personal knowledge of the facts, (2) submit evidence of his military service, and (3) to relinquish all but 16 acres of his claim so that the two acres cultivated

during the third and fourth entry years will equal 1/16 of the area claimed, or (4) to show cause why the final proof that he has submitted should not be rejected and his claim canceled.

Appellant was advised in this decision that partial compliance would not be considered.

Appellant wrote the Bureau on May 29, 1971, informing it that he was confused as to why the May 4, 1971, decision had only credited him with two acres of cultivated land. He indicated that the balance of the acreage was in grazing grass. He stated that the testimony of the two witnesses was forthcoming and that he had enclosed his proof of military service. He explained that his final proof should be accepted and reserved his right to appeal.

On July 8, 1971, appellant filed the second final proof. Testimony of two witnesses was filed the same day. The acreage cultivated was the same as that listed in the previous final proof, except for the additional acreage for the entry year 1971 during which appellant claims to have cultivated 20 acres, two of which were devoted to garden and the other 18 to grass.

On October 26, 1972, the State Office again rejected appellant's final proof for failure to meet the cultivation requirement of 43 CFR 2567.5(b) and canceled the claim.

Even if we allow appellant every possible advantage, he still fails to meet the full cultivation requirement. Regarding the additional 18 acres claimed in 1971, it is doubtful whether this acreage could be credited to appellant in fulfilling his cultivation requirements. Since the statutory life of the entry expired on March 30, 1971, it would have been necessary to have cultivated this acreage between January and March. The State Office explained that this would be unusual due to the climatic conditions of this area. Cultivation of a homestead entry must be done in such a manner as to be reasonably calculated to produce profitable results. United States v. Lance, 73 I.D. 218 (1966); United States v. Oldaker, A-30378 (August 26, 1965). A mere pretense of cultivation does not satisfy the requirements of the law. Jess H. Nichols, Jr., A-30065 (October 13, 1964). However, it is improper to reject final proof and to cancel a homestead entry, without a contest, on the sole basis that a crop was planted in the coldest months of the winter in Alaska and therefore the attempted cultivation was not performed in good faith. George J. Sehm, A-30129 (November 9, 1964). But, even assuming that this cultivation did take place in a responsible manner in those months and thus allowing appellant to meet his requirements for the fifth entry year, he would still be deficient for the second, third and fourth entry years.

Appellant cannot apply his military service because 43 CFR 2096.0-5(b) states that military service must be active. Appellant's certificate of discharge shows that he was in the Naval Reserves but that he was not on active duty; therefore, he cannot claim the benefit of this regulation.

In his letter of June 30, 1971, to the State Office appellant claims that the additional 18 acres took the last two years to cultivate and this was due to "poor health and unusually severe soil conditions, and also uneven terrain." Appellant might have applied for a reduction in the required acreage under 43 CFR 2511.4-3(b)(1), which permits a reduction in the cultivation requirement when the condition of the land makes the required amount of cultivation impracticable. Under this regulation, an application for reduction must be filed at the Land Office, explaining in detail the special conditions on which the claim to a reduction is based. Appellant did not file an application and therefore cannot avail himself of any possible benefits of this regulation. Gene L. Brown, 7 IBLA 71 (1972).

Also, 43 CFR 2511.4-3(b)(2) allows a reduction in the required cultivation during the period of disability if the applicant notifies the Manager of the Land Office within 60 days of the occurrence of the misfortune and submits satisfactory proof regarding the misfortune at the time of submitting final proof. No such notification was filed with the State Office. Since appellant did not notify the State Office or submit the necessary proof of misfortune with his final proof, he does not qualify under this regulation. Gene L. Brown, *supra*; Lois A. Mayer, 7 IBLA 127 (1972).

Having reviewed the possibilities which may have enabled appellant to satisfy the cultivation requirements, we are faced with the final proof which shows nonperformance of the required amount of cultivation. The final proof must be rejected and the entry canceled when final proof shows on its face that the entryman did not comply with the cultivation requirements of the law, and a reduction in the requirement is not warranted. Lois A. Mayer, *supra*; DeWitt W. Fields, 8 IBLA 160 (1972); Donald M. Fell, A-30862 (February 21, 1968); Arnold H. Echola, A-30831 (November 16, 1967). Therefore, the decision below was not improper.

Nevertheless, appellant alleges facts which, if verified, would constitute compliance with the Homesite Act of May 26, 1934, 43 U.S.C.

§ 687a-1 (1970). 2/ The Notice of Location of Settlement or Occupancy Claim ! Alaska, filed by appellant at the initiation of his settlement of the land, is the same form used to give notice of settlement under the homesite law (Form 2200-1), and may be treated as notice of settlement of the land for the purposes of that law. Appellant further alleges the expenditure of \$ 15,000 on such improvements as his home, roads, clearing, cultivation, etc.

In consideration of these allegations, and in order to avoid the severe hardship which might result from an unqualified affirmation of the decision below, appellant will be afforded an opportunity to file an application to purchase a homesite of not more than five acres embracing his principal improvements. Donald M. Fell, supra, fn. 3. The Alaska State Office will fix a date certain by which appellant must take the appropriate action, and will so notify the appellant. Action rejecting the homestead final proof will be suspended in the interim. See Robert W. Blondeau, 1 IBLA 8 (1970). Appellant is urged to consult the proper Bureau officers for a clear understanding of what must be done within the allotted time to avoid final cancellation of the claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for further action consistent with this decision.

Edward W. Stuebing  
Member

We concur:

Anne Poindexter Lewis  
Member

Joan B. Thompson  
Member

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2/ The homesite law requires that the applicant have a habitable house on the land, as does the homestead law, and that he reside there for not less than 5 months each year for three years, which is less than the minimum residence required of the entryman of an ordinary homestead. Accordingly, compliance with the habitation and residence requirements of the homestead law will also qualify the settler under the homesite law. In contrast to the homestead or trade and manufacturing site laws, qualification under the homesite law involves no cultivation or commercial activity.

